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No. 87-633

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

APEX OIL COMPANY,

Petitioner,

v.

JOSEPH DiMAURO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

STINNES RESPONDENTS' BRIEF IN OPPOSITION

DONALD E. EGAN
Counsel of Record
LEE ANN WATSON
JAMES E. HANLON, JR.
KATTEN MUCHIN & ZAVIS
525 West Monroe Street
Chicago, Illinois 60606
(312) 902-5200

Attorneys for Respondents Stinnes Corporation and Stinnes Interoil, Inc.

QUESTION PRESENTED

Whether the Court of Appeals correctly granted summary judgment to respondents Stinnes Corporation and Stinnes Interoil, Inc. as alleged antitrust co-conspirators in the absence of any evidence connecting them to the alleged conspiracy.

RULE 28.1 LISTING

Pursuant to Supreme Court Rule 28.1 respondents Stinnes Corporation and Stinnes Interoil, Inc. state as follows:

1. Stinnes Interoil, Inc. is a wholly owned subsidiary of respondent Stinnes Corporation.

2. Stinnes Corporation's corporate parent is Stinnes A.G., a German corporation, the ultimate parent of which is Veba Aktiengesellschaft, also a German corporation. Stinnes Corporation has hundreds of non-domestic affiliates throughout the world. Its domestic affiliates are the following:

Brenntag Interchem, Inc.
Delta Distributors, Inc.
Delta Solvents and Chemicals Company
Delta Solvents and Chemicals Company of Louisiana
Deminex U.S. Oil Co.
F. & S. Alloys & Minerals Corp.
Goldberg Emerman Corp.
Hansen Coal Corporation
Houston SRE, Inc.
Huels America Corporation
Jet Oil Company
Mark Producing Inc.
Miller & Company
Nuodex, Inc.
Nuodex International Sales Corp.
Precision National Plating Services, Inc.
Rhunes Transport International Corporation
SOCO, Inc.
SOCO-Western Chemical Corp.
SRE Carlsbad, Inc.
Steelinter [USA] Inc.
Stinnes Coal Company, Inc.
Stinnes-Texas, Inc.
Tamco Resources Corporation
Textile Chemical Co. Inc.
VEBA Coal USA Inc.
VEBA Funding Inc.
Westmoreland Coal Corporation

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
RULE 28.1 LISTING	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
REASONS WHY THE PETITION SHOULD BE DENIED	2
1. The Second Circuit's Opinion Did Not Misapply *Monsanto*	2
2. The Second Circuit Did Not Abrogate Petitioner's Seventh Amendment Right To A Jury Trial And Review By This Court Would Involve A Mere Reexamination Of The Evidence	6
CONCLUSION	9

TABLE OF AUTHORITIES

	PAGE
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986)	7
Berenyi v. District Director, Immigration & Naturalization Service, 385 U.S. 630 (1967)	8
Branti v. Finkel, 445 U.S. 507 (1980)	8
Fidelity & Deposit Co. v. United States, 187 U.S. 315 (1902)	7
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949)	8
Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986)	2, 7
Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984)	2, 6, 7, 8
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)	7
Rogers v. Lodge, 458 U.S. 613 (1982)	8
Texas v. Mead, 465 U.S. 1041 (1984)	8
United States v. DeLuna, 763 F.2d 897 (8th Cir.), *cert. denied*, 474 U.S. 980 (1985)	4
United States v. Johnston, 268 U.S. 220 (1925)	8
United States v. Marrapese, 486 F.2d 918 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974)	3
United States v. Marsh, 747 F.2d 7 (1st Cir. 1984)	4
United States v. Wardy, 777 F.2d 101 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1280 (1986)	4
United States v. Wilkinson, 754 F.2d 1427 (2d Cir.), *cert. denied*, 472 U.S. 1019 (1985)	3

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STINNES RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Stinnes Corporation and Stinnes Interoil, Inc. ("Stinnes"),[1] respectfully request that this Court deny the petition of Apex for a writ of certiorari seeking review of the opinion in this case by the United States Court of Appeals for the Second Circuit, which is reported at 822 F.2d 246 (1987).[2]

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[1] Stinnes adopts the same shorthand references to the parties used in the petition. (Pet. at 3 n.4).

[2] The Second Circuit's opinion is also set forth in full in the petitioner's Appendix at A3-A36.

STATEMENT OF THE CASE

Rather than respond to the petitioner's mischaracterization of the facts, Stinnes refers the Court to the opinions of the Second Circuit and the District Court, which fully set forth the factual and procedural history of this case. (Pet. App. at A7-A15; A43-A53).

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Second Circuit's Opinion Did Not Misapply *Monsanto*

Only the Second Question Presented in Apex' petition is directed to Stinnes.[3] Contrary to Apex' contention, however, the Second Circuit's opinion does not involve a "misapplication of this Court's decision in *Monsanto*,[4] resulting in the unconstitutional abrogation of the Seventh Amendment right to a jury trial." (Pet. at 20).

Applying this Court's *Monsanto* and *Matsushita*[5] guidelines for determining whether summary judgment should be granted in an antitrust conspiracy case, the Second Circuit concluded that a jury should decide whether a conspiracy existed between two of the defendants, Global and Northeast. (Pet. App. at A24). Having found that a conspiracy might be inferred between two of the defendants, the Second Circuit then proceeded to review the record to determine whether there was some evidence to con-

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[3] The First Question presented is addressed solely to the Exchange.

[4] *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

[5] *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986).

nect any of the other defendants to that conspiracy.[6] (Pet. App. at A24-A33). In doing so, it applied the so-called "slight evidence" rule. (Pet. App. at A26). Writing for the panel, Judge Pierce clearly stated:

> We have carefully reviewed this evidence and, while we reverse and remand as to the antitrust claims against Belcher for the reasons stated above, and *remain aware that " 'once a conspiracy is shown, only slight evidence is needed to link another defendant with it,' " Wilkinson, supra,*[7] *since we do not find such a link,* we conclude that affirmance of the grant of summary judgment is appropriate as to the remaining defendants.

(Pet. App. at A28) (emphasis added). Hence, Apex' assertion that the Court of Appeals "failed to consider the evidence against the other defendants against the backdrop of conspiracy" is incorrect. (Pet. at 23). That is precisely what the Second Circuit considered.

Apex also suggests in its petition that the Court of Appeals granted Stinnes summary judgment based on the "tends to exclude" evidentiary requirement of *Monsanto* and failed to apply the "slight evidence" rule. (Pet. at 22-23). What Apex glosses over, however, is that, though the "slight evidence" rule concededly requires a lesser showing than necessary to infer the existence of a conspiracy in the first instance, it nonetheless requires at

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[6] As the result, the Court of Appeals reversed and remanded as to Belcher for trial. Belcher has filed its own petition for a writ of certiorari (No. 87-631) and has predictably joined in Apex' petition. Also pending before the trial court are the counterclaims of Stinnes and Belcher for manipulation by Apex and that of the Exchange, none of which were the subject of any summary judgment motion.

[7] *United States v. Wilkinson*, 754 F.2d 1427, 1436 (2d Cir.), *cert. denied*, 472 U.S. 1019 (1985) (quoting *United States v. Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974)).

least some evidence of a *link* or *connection* by the defendant to the conspiracy.[8] As to Stinnes, the Second Circuit's careful review of the evidence revealed absolutely no link or connection to the conspiracy between Global and Northeast. (Pet. App. at A28-A29). Indeed, like the District Court, it considered "what inferences reasonably may be drawn from each piece of evidence" as well as the inferences "in light of all of the evidence proffered by Apex." (Pet. App. at A21).

Moreover, merely because the Court of Appeals chose to adopt some of the findings of the District Court, which are set forth in detail in the exhaustive 75-page District Court opinion, it does not follow, as the petition asserts, that the Court of Appeals ignored the "slight evidence" rule which it expressly endorsed and followed. (Pet. at 23). In fact, mindful that, unlike the District Court, it did find that Apex' evidence could possibly establish a conspiracy between some of the defendants, the Second Circuit stated:

> [W]e have carefully considered the arguments of Apex with respect to these conversations. For *essentially* the reasons stated by the district court, *see* 641 F. Supp. at 1266-69, we conclude that inferring the existence of a conspiracy from the remaining conversations would amount to mere speculation.

(Pet. App. at A28) (emphasis added). The portion of the District Court's opinion referenced in the Second Circuit's

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[8] For example, each of the cases relied upon and quoted at page 21 of Apex' petition refer to the necessity of such a nexus. *See also United States v. Marsh*, 747 F.2d 7, 13 (1st Cir. 1984) ("It perhaps should be called the 'slight connection' rule instead of the 'slight evidence' rule."). *Accord United States v. Wardy*, 777 F.2d 101, 107 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1280 (1986); *United States v. DeLuna*, 763 F.2d 897, 924 (8th Cir.), *cert. denied*, 474 U.S. 980 (1985).

opinion supports the Court of Appeals' adherence to the "slight evidence" rule because it demonstrates that Apex failed to establish that Stinnes was "linked" or "connected" to the conspiracy. (Pet. App. at A75-A82).

For example, the District Court aptly pointed out that, of the thirteen groups of communications urged by Apex to establish the conspiracy, only one involved Stinnes and that was its contacts with DiMauro, its broker. (Pet. App. at A81-A82). The District Court further observed that:

> [O]nce the communications between client and broker are excluded—as they must be—we are left with a total of *six* communications . . . between the six alleged co-conspirator longs, hardly a "pattern of pervasive inter-firm communications". It is significant that *none* of the communications involved Eastern or Stinnes. . . .

(Pet. App. at A82) (emphasis original). Accordingly, the Second Circuit's concurrence with the District Court's finding that there was no evidence that Stinnes had had *any* contact with the other longs, including Global and Northeast, is totally consistent with its determination that Apex failed to satisfy even the "slight evidence" rule with respect to a Stinnes "connection" to the conspiracy.[9]

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[9] In contrast to the total absence of any evidence linking Stinnes to the alleged conspiracy, the Court of Appeals did find that Apex satisfied the slight evidence standard against Belcher. (Pet. App. A27). That evidence—a conversation between principals of Global and Belcher, notes by a Belcher principal that were similar to those of a Northeast principal, and additional notations by a Belcher principal—was held to be sufficient that a jury might infer "that Belcher, Global and Northeast 'had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.' " *Id.*

Finally, having found no link between Stinnes and the possible Global-Northeast conspiracy the Second Circuit then reviewed the evidence to determine if a second and separate conspiracy involving Stinnes might be inferred under *Monsanto*:

> Apex offers no evidence tending to show that this sequence was part of any agreement *beyond* one between Stinnes and its broker, DiMauro. Moreover, the fact that Stinnes used its broker to make the offers does not amount to an illegal conspiracy. A more likely inference from this evidence is that once the market became aware of Apex's delivery obligations, Stinnes and others, as rational sellers, raised the price of oil in order to take advantage of Apex's plight.

(Pet. App. at A29) (emphasis added). This inquiry was likewise a correct application of the *Monsanto* test.

2. The Second Circuit Did Not Abrogate Petitioner's Seventh Amendment Right To A Jury Trial And Review By This Court Would Involve A Mere Reexamination Of The Evidence

Apex does not and cannot contend that the decision of the Court of Appeals is in conflict with any decision by this Court or any other court of appeals. Rather, it asserts that the Second Circuit's decision should be reviewed because "as interpreted below, *Monsanto* would become a vehicle for the wholesale abrogation of an antitrust plaintiff's constitutional right to a jury trial." (Pet. at 23).

As demonstrated above, the Second Circuit did not misinterpret or misapply *Monsanto*. Similarly, Apex' *in terrorem* fear of infringement of Seventh Amendment rights is without basis since it is well settled that a properly granted summary judgment motion does not violate a

party's Seventh Amendment rights. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979); *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902). Indeed, in holding that the test on a summary judgment motion is the same as that on a motion for directed verdict this Court has endorsed "taking the case from the jury" when appropriate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2512 (1986); *Matsushita*, 106 S. Ct. 1348, 1357.

The Second Circuit not only correctly applied *Monsanto*, but in doing so it was sensitive to Apex' Seventh Amendment rights, explaining the delicate balance between the two as follows:

> We must note however that *while summary judgment is a valuable means for avoiding unnecessary trials*, and recent Supreme Court as well as Second Circuit cases have tended to encourage its use in complex cases such as this one . . . *it should not be regarded as a substitute for trial.* Thus, while the Supreme Court has indicated that trial courts should draw only reasonable inferences in favor of the non-moving party viewing the evidence as a whole . . . and while some assessing of the evidence is necessary in order to determine rationally what inferences are reasonable and therefore permissible, *it is evident that the question of what weight should be assigned to competing permissible inferences remains within the province of the fact-finder at a trial.*

(Pet. App. at A17) (emphasis added; citations omitted). The Second Circuit's opinion therefore cannot be fairly characterized, as Apex would have it, as running afoul of this Court's decision in *Monsanto* or Apex' Seventh Amendment rights.

In the final analysis, Apex' quarrel is not with the Second Circuit's application of *Monsanto*, or its asserted conflict with the "slight evidence" rule, or its alleged abrogation of the Seventh Amendment, but rather with the Second Circuit's conclusion—a conclusion reached after a studied review of the evidence against the applicable legal standard. Belcher has a similar quarrel and has filed its own petition for writ of certiorari, and joined in Apex' petition. Those quarrels are not, however, sufficient reason to grant certiorari. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). *See also Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.). Indeed, granting certiorari as to Stinnes would be particularly improvident since both the District Court and the Court of Appeals found, after examining a voluminous record,[10] that Apex did not proffer *any* evidence showing a link between Stinnes and the conspiracy. *See, e.g., Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). *Accord Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980); *Berenyi v. District Director, Immigration & Naturalization Service*, 385 U.S. 630, 635 (1967).

[10] As noted in Apex' Petition, a joint appendix of eleven volumes (over 8000 pages) consisting of portions of over 120 depositions and voluminous document discovery was submitted to the Second Circuit. (Pet. at 7, n.8). And the two lower court's opinions together comprise over 100 pages of the Appendix to the Petition, much of which is devoted to a detailed discussion of the evidence. (Pet. App. at A3-A115).

CONCLUSION

For all of the foregoing reasons, the Petition For A Writ Of Certiorari should be denied.

Dated: November 13, 1987

Respectfully submitted,

DONALD E. EGAN
Counsel of Record
LEE ANN WATSON
JAMES E. HANLON, JR.
KATTEN MUCHIN & ZAVIS
525 West Monroe Street
Chicago, Illinois 60606
(312) 902-5200

Attorneys for Respondents Stinnes Corporation and Stinnes Interoil, Inc.